STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 264849 Kent Circuit Court
JOSHUA DAVID BUSHEY, Defendant-Appellant.	LC No. 04-005018-FC

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

A jury trial convicted defendant of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 50 to 75 years' imprisonment for the robbery conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. Factual Background

The jury convicted defendant for robbing a convenience store in Cedar Springs on April 22, 2004. Two masked men with guns entered the store, and one man immediately fired a single shot that lodged in a cigarette carton near the cash register. The men left with $170 in cash. A customer followed the robbers and copied down the license plate number of a car registered to Suzanne Spicer. Spicer was charged in the offense and testified at trial pursuant to a plea agreement. Spicer testified that she acted as the getaway driver, and that she, defendant, and codefendant Theodore Lawton planned the robbery because they needed money. Spicer identified defendant as the first robber to enter the store and Lawton as the second robber.

Police arrested defendant and Lawton the next day, after a brief foot chase. The right lens of defendant's eyeglasses was missing when he was arrested and Spicer testified that defendant lost the lens during the robbery. Police found two guns in defendant and Lawton's apartment, a nine-millimeter and a Derringer, along with a box of nine-millimeter cartridges. Spicer testified that Lawton carried the nine-millimeter handgun and that defendant carried the Derringer during the robbery. Testing revealed that a shell casing found outside the store's south entrance was fired from the nine-millimeter gun that was found in the apartment, and the bullet recovered from the store was consistent with having been fired from that gun. Further, police also found a coat similar to one worn by one of the robbers. It contained both defendant's and

Lawton's DNA, with defendant being the major contributor of DNA on the collar. Two masks matching the descriptions given by Spicer were found along the road near the store. Defendant's and Lawton's DNA was found on one mask, with defendant being the major contributor. Defendant and Lawton were excluded as donors of the DNA found on the other mask.

Cell phone records from a phone defendant carried when he was arrested showed defendant's whereabouts on the night of the robbery. The locations corresponded with Spicer's account of the evening. Defendant testified that he was alone on Lafayette Street waiting for a friend when the robbery occurred and he asserted that Spicer, Lawton, and Spicer's boyfriend, Mike, committed the robbery. The phone records contradicted defendant's testimony regarding his whereabouts when the crime occurred.

II. Issues Raised by Appellate Counsel

Defendant claims that the trial court improperly scored offense variables 1, 7, 14, and 19. "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Furthermore, "we review de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id.*

Defendant argues that the trial court erred in scoring offense variable (OV) 1 at 25 points. OV 1 provides that 25 points should be scored if "[a] firearm was discharged at or toward a human being . . . ." MCL 777.31(1)(a). Evidence showed that Lawton fired a gun toward the victims as he entered the store. One victim's child was located behind the display case where the bullet lodged, another victim was to her left at the cash register, and a third victim was standing at the counter. The trial court correctly scored OV 1 at 25 points.

Defendant contends that the trial court improperly scored OV 7 at 50 points. Fifty points is proper if "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). Terrorism is defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). As noted, Lawton fired a gun in the direction of the display counter where the victims were standing as soon as he and defendant entered the store. The trial court did not err when it determined that the victims were "treated with terrorism."

The trial court also correctly scored OV 14 at ten points. Defendant maintains that, contrary to his score, he was not a leader in a multiple offender situation. MCL 777.44(1)(a). However, there can be multiple leaders when three or more offenders are involved. MCL 777.44(2)(b). Here, Spicer drove the getaway car and Lawton provided the guns and fired a shot to scare the victims. However, defendant also carried a gun and demanded the money from the victims. It was, therefore, reasonable for the trial court to find that both defendant and Lawton were leaders.

Defendant further claims that the trial court incorrectly scored 10 points for OV 19. Ten points is appropriate under OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Evidence showed that defendant

ran from the police when they announced their presence and tried to arrest him. *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003).[1] Accordingly, the trial court correctly scored this variable.

III. Issues Raised in Defendant's Standard 4 Brief

A. Ineffective Assistance of Counsel

In a pro se supplemental brief, defendant raises several claims of ineffective assistance of counsel.[2]

Defendant asserts that defense counsel was ineffective for failing to call witnesses who would have testified that Spicer knew defendant's real name. However, defense counsel elicited from Detective Johnson that during Spicer's initial interview in which she referred to defendant as "Mike," she also called defendant by his real name. Additionally, Spicer admitted that she had lied numerous times during her initial interview. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant has not overcome the presumption that defense counsel raised this point in an alternative manner as a matter of trial strategy.

Defendant maintains that several witnesses also could have testified that he had given them money before the robbery, which would show that he did not need to commit a robbery for money. Defendant asserts that the witnesses would also testify that Spicer had an African-American boyfriend named Mike, which would show that Spicer falsely implicated defendant in order to protect her boyfriend. However, both a prosecution witness and defendant testified about Spicer's boyfriend named Mike and that defendant never lacked money. Again, defendant

[1] Defendant also argues that defense counsel should have objected to the scoring because the trial court considered facts not found by a jury, contrary to *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has ruled that *Booker* and *Blakely* do not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Therefore, counsel was not ineffective for failing to raise this issue. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

[2] The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *Mack*, *supra* at 129.

has not overcome the presumption that defense counsel's decision not to present duplicative testimony through these other witnesses was a matter of trial strategy.[3]

Defendant avers that defense counsel was ineffective for failing to impeach certain aspects of Spicer's testimony. Although defendant observes that when Spicer was initially shown the videotape of the robbery, she identified the first robber as Lawton, but then later identified the same robber as defendant, he does not suggest what defense counsel should have done differently. The record reveals that Spicer admitted to making the conflicting identifications and was cross-examined about it. Thus, defense counsel questioned the credibility of her second identification.

Defendant also asserts that defense counsel should have impeached Spicer with her preliminary examination testimony regarding whether she saw the guns on the night of the robbery. We disagree because Spicer's testimony was consistent in this regard. Also, though Spicer revealed for the first time at trial that Lawton stated that he was going to fire the nine-millimeter gun during the robbery, Spicer admitted on cross-examination that she had never told anyone about Lawton's statement before testifying. Therefore, the point was presented to the jury.[4]

Defendant further contends that defense counsel was ineffective for failing to impeach one of the robbery victims with her preliminary examination testimony, in which she stated that both of the robbers' guns were black. The witness testified at trial that one gun was black and one was silver. Defendant asserts that the only explanation for the change in the victim's testimony is that the police gave her the descriptions and thus, this is evidence of witness tampering. We disagree. Witnesses often remember details differently after reflection. Also, though defendant denied being one of the robbers, he did not contest that the guns found in his apartment (one black and one silver) were the ones used in the robbery. Therefore, defense counsel's failure to question the victim regarding her change in testimony on this matter was not objectively unreasonable and, regardless, defendant suffered no prejudice.[5]

B. Police Misconduct

Defendant claims that Detective Johnson misrepresented facts in the affidavit used to obtain a search warrant for defendant's apartment. Though this issue is unpreserved, we hold

[3] For the same reason, defense counsel did not deprive defendant of a substantial defense.

[4] Defendant also complains that defense counsel was ineffective for failing to impeach Detective Burns with his report regarding his surveillance of defendant's apartment. However, we find nothing in his report that actually contradicted his testimony. Accordingly, this claim has no merit.

[5] Defendant also claims that defense counsel was ineffective for failing to present a viable defense because she did not seek funds to hire a DNA expert to counter the prosecution's witness. Defendant admitted that he wore the coat and the hat that was made into a mask, so he admitted that his DNA was on the garments. Therefore, we find that defendant was not denied a substantial defense.

that the search warrant affidavit and the evidentiary materials submitted by defendant do not support defendant's claim that the affidavit was based on false information, or that material information was omitted from the affidavit. Therefore, appellate relief is not warranted.

Defendant also claims that Detective Johnson illegally obtained his cell phone records and, therefore, the records should not have been admitted at trial. However, defense counsel specifically stated that she had no objection to the admission of the cell phone records. Thus, any error was waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). In any event, defendant does not cite factual support for his position and the record does not support it. Accordingly, defendant's claim is without merit.[6]

Defendant maintains that Detective Johnson tampered with evidence. Specifically, defendant claims that Lawton had defendant's cell phone when Lawson was arrested and that Detective Johnson later placed it in defendant's property box. Although defendant refers to a videotape of his police interview in support of this claim, the videotape is not part of the lower court record and has not been submitted on appeal. Further, defendant does not assert that the videotape contains any admission by Detective Johnson that he placed the cell phone in defendant's property box. Rather, defendant only asserts that the videotape contains a discussion about the cell phone. Thus, defendant has not demonstrated that the videotape factually supports this claim. Furthermore, at trial, Detective Johnson testified that another detective arrested defendant and patted him down. His personal property was placed in a box outside a police interview room, which is where Detective Johnson saw the phone. Thus, there is no plain error evident from the record.

We also reject defendant's claim that defense counsel was ineffective for failing to impeach Detective Johnson with the videotape. Because defendant makes no assertion that the videotape contains any admission by Detective Johnson, defendant has failed to show that the videotape could have been used for impeachment purposes. Moreover, defense counsel reasonably may have decided to keep the interview from the jury because of its other content. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).[7]

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[6] Furthermore, because the record does not support defendant's claims that the search warrant affidavit was invalid or that the cell phone records were obtained illegally, defendant's corresponding ineffective assistance of counsel claim also fails. Counsel is not required to make futile motions. *Mack, supra* at 130.

[7] Defendant claims that the prosecutor knowingly presented false testimony from several witnesses. We find no merit to this claim. With respect to the testimony of Detective Johnson and Detective Burns, we find no basis in the record for concluding that their testimony was false, let alone that the prosecutor was aware of any alleged falsity. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998).

Defendant also asserts that "other witnesses" presented false testimony, but Spicer is the only other witness defendant identifies. However, defendant does not state what specific

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C. Sufficiency of the Evidence

Defendant asserts that the prosecutor presented insufficient evidence that he committed the crime.[8] Spicer testified that she committed the robbery with defendant and Lawton. She identified defendant as the first robber, by his voice and the tan shirt he was wearing. The first robber wore a mask and a coat and carried a gun and defendant was the major contributor of DNA on the mask and the coat collar. Defendant's cell phone records also corroborated Spicer's account of their locations at various times. Defendant admitted that the phone was his and did not deny that he used and possessed it on the night of the robbery. The phone records also showed that defendant was near a friend's residence at approximately 10:30 p.m. that night, not on Lafayette Street as defendant claimed. Moreover, defendant lied to the police regarding his whereabouts on the night of the robbery and tried to get another friend, Lee Blunston, to provide him with a false alibi. This evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that defendant participated in the charged robbery and possessed a firearm during the commission of the offense. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Accordingly, defense counsel was not ineffective for failing to move for a directed verdict at trial.[9] *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Moreover, while defendant asserts that inconsistencies in Spicer's testimony and the presence of DNA from other people on the mask supports his claim of innocence, this Court does not interfere with the jury's role of determining the weight of evidence or the credibility of

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testimony the prosecutor knew was false. Defendant mentions numerous inconsistencies in Spicer's testimony, but Spicer explained the inconsistencies at trial by stating that she either was mistaken earlier or that she later remembered the statement or event. There is nothing in the record to indicate that the prosecutor affirmatively knew that Spicer was lying during her testimony.

Because the record does not support this claim, we also reject defendant's related claim that defense counsel was ineffective for allowing the prosecutor to present perjured testimony. *Mack*, *supra* at 130.

[8] "The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant was armed with a weapon described in the statute." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); MCL 750.529. The elements of felony-firearm are: (1) the possession of a firearm; (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

[9] Our standard of review for a directed verdict motion is essentially the same as for sufficiency of the evidence. This Court reviews a trial court's decision on a motion for directed verdict de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.

witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Rather, all conflicts in the evidence must be resolved in favor of the prosecution. *Id*. at 561-562.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Deborah A. Servitto